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Before the
**Federal Communications Commission**
Washington, D. C. 20554

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| In the Matter of | ) | |
| | ) | |
| Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 | ) | CC Docket No. 96-98 |
| | ) | |
| Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers | ) | |



**ERRATA**

It has come to our attention that the Comments of OpTel, Inc. ("OpTel") in the above-captioned proceeding were filed without a "Table Of Contents" or "Summary." Accordingly, please find attached an amended set of comments identical in all respects to OpTel's initially-filed comments but for the fact that they now include a Table Of Contents and a Summary.

Respectfully submitted,

OPTEL, INC.

/s/ W. Kenneth Ferree
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Its Attorneys

June 1, 1999

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**COMMENTS OF OPTEL, INC.**


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## SUMMARY

The Commission should define the applicable standards under Section 251 and identify the minimum set of network elements that meet those standards. By establishing an initial floor from which more refined unbundling policies may develop over time, the Commission will help to provide the kind of certainty that will be required if facilities-based competitive entry is to be financed by the capital markets.

Second, consistent with the Court's opinion in Iowa Utilities, the Commission's reassessment of the standards for identifying UNEs should be guided by the "essential facilities" doctrine. The local loop unquestionably meets this standard, as do subloop elements.

One particular subloop element deserves particular mention — on-property distribution networks in the multi-tenant context. Today, a lack of access to on-property networks represents the single most significant barrier to entry for CLECs that already have invested in facilities to duplicate ILEC loops, but which cannot reach customers on MDU properties. Thus, as set forth in the proposed rules (see Attachment 1), the Commission should identify MDU on-property networks as nationwide UNEs.

Because on-property networks often are configured to multiple demarcation points, simply unbundling that subloop element will not, alone, make practical access to customers on MDU properties available. In order to make interconnection with on-property distribution facilities practical, carriers should be required to establish an single point of interconnection at the property line, or at a nearby street cabinet, of any MDU at which a competing carrier seeks to provide service.

Finally, because it is premature to judge the future need for any element to be identified as a UNE, OpTel urges the Commission not to adopt sunset/removal rules or policies at this time.

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## COMMENTS OF OPTEL, INC.

OpTel, Inc. ("OpTel"), submits these comments in response to the above-referenced Second Further Notice of Proposed Rulemaking ("NPRM").

### DISCUSSION

In the Iowa Utilities case,[1] the Court directed the Commission, in accordance with Section 251(d)(2) of the Telecommunications Act of 1996, to identify unbundled network elements ("UNEs") by reference to whether they are *necessary* and whether their absence would *impair* a competing carrier's ability to provide service. The Court analogized to competitive "light-bulb changing" — the unbundling rules should provide competitive local exchange carriers ("CLECs") with a ladder tall enough to reach the light fixture, but they need not provide a ladder even "one-half inch taller."

The Commission has issued the NPRM in order to revisit its unbundling rules and to determine, consistent with the Court's opinion, which network elements should be identified as UNEs, *i.e.*, which satisfy the *necessary* and *impair* standard as reinterpreted by the Court. Although the process begun by the NPRM will entail an in-depth review of the conclusions reached in the First Interconnection Order,[2] the one clear and incontestable UNE is the local loop, *i.e.*, the "ladder."

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1 AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999).

2 11 FCC Rcd 15499 (1996).

If incumbent local exchange carriers ("ILECs") are required to provide CLECs with access to the whole ladder, *a fortiori*, they cannot be allowed to deny CLECs the "final rung" when a CLEC's own ladder is one-step too short. Therefore, as set forth more fully below, the Commission should in this proceeding identify subloop elements, including the on-property distribution facilities on multiple dwelling unit ("MDU") properties, and the feeder/distribution interface, as UNEs under Section 251.

## I. The Commission Should Identify A Minimum Set Of Network Elements That Must Be Unbundled On A Nationwide Basis.

In the NPRM, the Commission has asked first whether it should adopt national unbundling requirements.[3] Because the establishment of national unbundling requirements will add certainty to the market, and therefore enhance the ability of new entrants to attract the capital necessary to compete, OpTel supports the Commission's tentative conclusion that it "should continue to identify a minimum set of network elements that must be unbundled on a nationwide basis."[4]

The Commission should define the applicable standards under Section 251 and identify the minimum set of network elements that meet those standards at this early stage in the development of competitive local exchange markets. By establishing an initial floor from which more refined unbundling policies may develop over time, the Commission will help to provide the kind of certainty that will be required if facilities-based competitive entry is to be financed by the capital markets.

Further, the establishment of nationwide UNEs will make it possible for CLECs to enter in multiple markets and jurisdictions without having to adopt different entry strategies in each market based on differing sets of unbundling requirements. The Commission will ensure that the elements that meet the unbundling standards will vary little, if at all, from region to region. At bottom, if nationwide competitive entry is sought, nationwide pro-competitive policies are required.

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[3] NPRM ¶ 14.

[4] Id.

Finally, this proceeding will not resolve all unbundling questions, for all parties, for all time. The Commission's action in this proceeding will not foreclose the states from imposing supplemental unbundling requirements, and the establishment of a minimum national set of UNEs will not prevent ILECs from petitioning the Commission for removal of an element from the list in a particular market based on the particular facts and prevailing market conditions.

## II. The "Necessary" And "Impair" Standards In Section 251(d)(2) Require That Identified UNEs Are (1) Essential To The Provision Of Service And (2) Not Readily Or Practically Available From Multiple Sources.

The Supreme Court's decision in Iowa Utilities has changed the landscape with respect to UNEs. Although several Justices wrote separately, seven of the eight participating Justices agreed that the FCC had failed to apply "some limiting standard" in determining which network elements ILECs are required to unbundle. The decision vacated the FCC's UNE rule, and directed the FCC to revisit the issue to determine whether the FCC's identified UNEs actually are *necessary* and whether the absence of these elements would *impair* a requesting carrier's ability to provide service.

Although not specifically adopting the "essential facilities" doctrine from antitrust law, the Court suggested that the limiting principle in the 1996 Act regarding the identification of UNEs should be analogous.[5] In particular, the Court noted that although it is *necessary* to have a ladder tall enough to reach a light fixture without overextending one's arms in order to change the light bulb, it is not *necessary* to have a ladder "one-half inch" taller than that, nor does the lack of a ladder one-half inch taller *impair* one's ability to change the bulb.[6]

Consistent with the Court's opinion in Iowa Utilities, the Commission's reassessment of the standards for identifying UNEs should be guided by the "essential facilities" doctrine. In the antitrust context, the "essential facility" concept is comprised of two elements which are conceptually similar to the "necessary" and "impair" elements of Section 251(d)(2).

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[5] Iowa Utilities, 119 S. Ct. at 734-35.

[6] Id. at 735 n.11.

First, the facility in question must be "essential." That is, it must be a "unique" input necessary to compete in the market such that it has the capability of being used to "improperly interfere with competition" if withheld.[7] In terms used by Section 251, the facility must be "necessary" for one to provide the product or service in question.

Second, a party seeking to establish that a facility is an essential facility "must show that [the use of] an alternative to the facility is not feasible"[8] and that a would-be competitor cannot "practically or reasonably duplicate" the facility.[9] Or, to put this factor in terms used in Section 251, the lack of a given network element should not be regarded as "impairing" a CLEC's ability to provide service unless it is not readily or practically available from multiple sources.

Further, the "necessary" and "impair" standards of Section 251 must be interpreted in accordance with the policy goals and considerations underlying the 1996 Act. As Commissioner Powell explained in his separate statement, Congress understood that, "although requiring access to incumbent carriers' facilities may be useful, ... *unconstrained* access would eviscerate incentives for entrants to install their own facilities and thereby inhibit the type of competition most likely to spur innovation, provide price discipline and otherwise benefit consumers."[10]

Thus, only in those instances in which the benefits of sharing an element, in terms of enhanced competitive opportunities for new entrants, outweigh the costs of sharing should the element be identified as a UNE. As Justice Breyer pointed out in his concurrence, that is likely to be the case only for physical elements that can be readily segregated from the remainder of the ILEC network.[11]

## III. Loop And Subloop Elements Should Be Identified Nationwide As UNEs.

### A. Loop Facilities Are Prototypical UNEs.

For all of the debate about the intent of Congress in the 1996 Act, the one clear and incontestable UNE is the local loop. The legislative history of the 1996 Act

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[7] E.g., City of Anaheim v. Southern California Edison Co., 955 F.2d 1373, 1380 (9th Cir. 1992).
[8] E.g., Twin Laboratories, Inc. v. Weider Health & Fitness, 900 F.2d 566, 569-70 (2d Cir. 1990).
[9] Southern California Edison Co., 955 F.2d at 1380.
[10] NPRM (Powell Statement at 2).
[11] Iowa Utilities, 119 S. Ct. at 753-44 (Breyer, J., concurring in part and dissenting in part).

explicitly identifies the physical loop element as an example of a UNE,[12] and the vast majority of comments filed in the Commission's first implementing rulemaking proceeding supported the "conclusion that the local loop is a network element that should be unbundled."[13] On that basis, in its First Interconnection Order the Commission identified the loop (defined as the transmission facility between a distribution frame or its equivalent in an ILEC central office and the network interface device ("NID") at the demarcation point between CPE and the ILEC network) as a UNE.[14]

This conclusion remains valid under the more rigorous "essential facilities" rubric suggested in the Iowa Utilities decision.[15] Local loop facilities are an essential competitive input for carriers seeking to provide local exchange and access services and, consequently, they may be used to "improperly interfere with competition." Further, "an alternative to the facility is not [currently] feasible." The local loop is, therefore, a *necessary* element.

The local loop also satisfies the "impairment" standard. Because of the extensive networks required to be deployed, the disruption to public rights-of-way and other services that would result from the duplication of loop facilities, and the physical limitations on the number of loop network facilities that any given locality can support, no would-be competitor can "practically or reasonably duplicate" local loop facilities. They are, indeed, "unique" in every local telephone market in the U.S. such that denial of access to the loop unquestionably would *impair* a would-be competitor's ability to enter the market.

For these reasons, both Congress and the courts have described the local loop as an "essential facility."[16] Quite simply, "it is inconceivable ... that the local loop

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12 See Pub. L. No. 104-104, Joint Explanatory Statement at 116.

13 First Interconnection Order, 11 FCC Rcd at 15684.

14 Id. at 15689.

15 See NPRM ¶ 32 ("It is our strong expectation that under any reasonable interpretation of the 'necessary' and 'impair' standards of section 251(d)(2), loops will be generally subject to the section 251(c)(3) unbundling obligations."); Separate Statement of Chairman Kennard ("it is inconceivable to me that the local loop would not be on [the UNE] list, under any rationale application of the 'necessary' and 'impair' standards").

16 See, e.g., MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132-33 (7th Cir. 1982), cert. denied, 464 U.S. 891 (1983); United States v. Western Elec. Co., Inc., 673 F. Supp. 525, 535-40 (D.D.C. 1987); 104 H. Rpt. 204, 104th Cong., 1st Sess. (1995).

would not be on [the UNE] list, under any rationale application of the 'necessary' and 'impair' standards."[17]

B. Subloop Elements Also Are "Essential Facilities."

If the "ladder" is an essential facility for reaching the light fixture in order to provide a competitive light-bulb-changing service, each individual rung of the ladder is, *a fortiori*, no less essential. This common sense conclusion is confirmed by the Commission's own analysis in the First Interconnection Order.[18]

Just as the duplication of an entire loop would entail substantial construction and disruption of other services, requiring CLECs to overbuild ILEC distribution networks (or significant parts of those networks), even if the they are providing their own feeder plant and feeder/distribution interface elements, would delay entry and be "inefficient and unnecessary."[19] Further, if a CLEC were to build its own network, including switching facilities, feeder plant and network interface elements, but it was unable to reach a customer because the "last 100 feet" (*i.e.*, the last rung in the ladder) was not available, the remainder of the network would be stranded. Thus, ILEC distribution networks and other subloop elements are *necessary* elements under Section 251(d)(2).

The failure of ILECs to provide subloop elements also significantly *impairs* the ability of CLECs to compete in the market. It is the replication of the branches of the ILEC networks — the subloop distribution facilities — that requires the most extensive construction and which is therefore the most disruptive to other services and to the public in general. For that reason, subloop distribution facilities cannot be "practically or reasonably" duplicated.

Finally, not only are subloop elements "essential facilities," their identification as UNEs is "rationally related to the goals of the Act,"[20] and they are the kind of "readily separable and administratable physical facilities"[21] that may be

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17 NPRM (Statement of Chairman Kennard at 1).

18 See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Notice of Proposed Rulemaking, 11 FCC Rcd 14171, 14203 (1996) (tentatively concluding that subloop unbundling would further the purposes of the 1996 Act).

19 First Interconnection Order, 11 FCC Rcd at 15644.

20 Id.

21 Id. at 753 (opinion of Breyer, J.).

offered as unbundled elements without touching upon core ILEC managerial and central office functions. As the Commission recognized in its First Interconnection Order, allowing CLECs to purchase from ILECs only those loop or subloop facilities that the CLECs cannot themselves economically provide will promote competition and encourage the efficient deployment of network resources.[22]

By allowing CLECs access to subloop elements, the Commission will help to foster investment in competing facilities where they can be deployed, *i.e.*, CLECs should not be required to purchase from ILECs more facilities than they want, and ILECs should not be required to share those portions of the loop that a CLEC is willing to duplicate. Subloop unbundling, therefore, actually would reduce the degree of sharing of network elements between ILECs and CLECs and promote facilities-based entry.

### C. Identifying MDU On-Property Subloop Distribution Facilities As UNEs Would Be The Single Fastest Way Of Promoting Facilities-Based Competitive Local Telephone Entry.

Based on all of the foregoing, the Commission should identify loop and subloop facilities as nationwide UNEs. One particular subloop element, however, deserves particular mention — on-property distribution networks in the multi-tenant context.

Today, a lack of access to on-property networks represents the single most significant barrier to entry for CLECs that already have invested in facilities to duplicate ILEC loops, but which cannot reach customers on MDU properties. In the market for local exchange service on MDU properties (commercial and residential) facilities-based CLECs are poised and ready to provide service, the only remaining barrier is access to the "final rung" of the ILEC "ladder" — the subloop distribution facilities on MDU properties.

Currently MDUs, which include campus and high-rise residential and commercial complexes, generally feature multiple points of interconnection that are inaccessible to new providers seeking to serve customers.[23] As a result, CLECs are not able to obtain efficient access to the on-property network, which is absolutely

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[22] 11 FCC Rcd at 15687, 15695.

[23] See Attachment 2.

*necessary* if a CLEC is to provide a competitive telephone option to consumers on the property.

This lack of access significantly *impairs* CLECs' ability to provide service to consumers the property. Quite simply, a CLEC seeking to compete on an MDU property must either build redundant facilities from the property line to each customer or lease entire loops from the ILEC in order to reach individual subscribers in the MDU. The costs and delays associated with either of these approaches are prohibitive.

There is no policy rationale to support a requirement that each new entrant build its own on-property distribution network. Not only is the build-out of redundant on-property network extremely costly for each new competitor, it is accomplished only at great expense and inconvenience to the property itself. Indeed, redundant cabling is impractical at many properties, especially high-rise buildings, where there is limited riser cable conduit space available. For that reason, property owners sometimes are reluctant to allow multiple telecommunications service providers to wire their properties.

Conversely, requiring incumbent providers to share on-property network facilities imposes little, if any, burden on the incumbent. A single set of on-property distribution facilities would remain available at the property for any carrier providing service to subscribers on the property. A wire that would be "dead" for any carrier not providing service to a particular unit would be "live" for the carrier that was.

The barrier to entry created by the lack of access to MDU properties also is contrary to the basic competitive principles of the 1996 Act. Under the current UNE rules, the only alternative to overbuilding MDU on-property distribution facilities is for CLECs to lease entire loop facilities from the ILEC's end-office to the customer. This alternative, however, not only is cost prohibitive, but it also renders extraneous the remainder of the CLEC network.

Eliminating this barrier would make facilities-based local exchange competition a reality for both business and residential consumers in MDUs. To continue the analogy begun by the Supreme Court, CLECs currently bring to the competitive market at MDU properties their own ladder, their own service

technician, and their own light bulb. Because of the barrier created by the need to retrench and rewire on-property distribution facilities, however, their competitive ladders are not quite tall enough to reach the customers; they are one rung too short. If the CLEC technicians would be allowed to use the whole ILEC ladder (*i.e.*, lease an entire loop) in order to provide a competitive service, they should be allowed to use only the last rung of that ladder.

Thus, as set forth in the proposed rules (see Attachment 1), the Commission should identify MDU on-property networks as nationwide UNEs. By allowing CLECs to obtain on-property distribution facilities on an unbundled basis, the Commission would encourage competitive facilities-based build-out to the property line and thereby ease collocation congestion at ILEC central offices. In turn, CLECs could bring their own networks close to end-users, provide all of their own services and network intelligence, and compete not only on price, but also on quality, reliability, and service.

Further, the resistance of MDU owners to the continual rewiring of their properties by multiple telecommunications service providers would be eased by the unbundling of on-property distribution networks. If CLECs were able to cross-connect at a single point of interconnection ("SPOI") at or near the property line, MDU owners could allow multiple providers to compete at their property without subjecting residents to repeated disruptions and construction for each new CLEC providing service at the property. Indeed, because it may be possible for CLECs to site their equipment off of the property to be served, the concerns of the MDU owners may be rendered moot and residents would be able to use any service provider that would bring its network to the SPOI.

In short, by making the "last rung" available to competitors, the Commission could, within a very few months, ensure that millions of homes and businesses would have available to them a competitive local telephone option. The FCC has at its disposal no other single tool that can add so much competition so quickly, consistent with the terms of the 1996 Act and the Court's opinion in Iowa Utilities.

### 1. Competitive access to on-property distribution facilities requires more than unbundling.

Because on-property networks often are configured to multiple demarcation points,[24] simply unbundling that subloop element will not, alone, make practical access to customers on MDU properties available. In order to make interconnection with on-property distribution facilities practical, carriers should be required to establish an SPOI at the property line, or at a nearby street cabinet, of any MDU at which a competing carrier seeks to provide service.[25] Further, the on-property network at new MDUs and at MDUs that are substantially rebuilt after the order in this proceeding is adopted should be configured to an SPOI.

Carriers should allow property owners/managers to determine the location of the SPOI, so long as it is at a point that is reasonably accessible and competitively neutral at or near the minimum point of entry ("MPOE") on the property.[26] The SPOI should be constructed with a neutral cross connect box permitting pin and jack coordination that would enable multiple carriers to serve customers at the property.

Naturally, the costs of any network reconfiguration required to make the on-property networks "competition-friendly" should be shared by the carriers concerned.[27] In addition, following reconfiguration, the owner of the on-property wire should be permitted to charge for the use and maintenance of such wire on a fair, reasonable, uniform, nondiscriminatory, and cost-based basis.

The reconfiguration of on-property networks to an SPOI, in combination with the unbundling of the on-property network, would allow competing networks to be cross connected each time a customer or unit at the MDU elects to switch service providers.

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24 See, e.g., Attachment 2.

25 Attachment 3 illustrates an SPOI configuration of MDU on-property network that would make practical access to customers on the property available.

26 For single buildings, this generally will be at the utility closet on the basement or first floor; for multi-building properties, this generally will be in a utility closet or other structure closest to where trunk lines cross the property boundary line.

27 Where an existing property has been reconfigured to an SPOI and the cost of the incumbent carrier's existing facilities have not been fully depreciated, the incumbent should, consistent with applicable state and federal laws, be permitted to use an accelerated depreciation methodology.

2. **There is no technical barrier to the unbundling of on-property distribution facilities.**

Although the Commission concluded in the First Interconnection Order that the identification of subloop facilities as UNEs would offer a variety of benefits in terms of increased competition, more efficient network deployment, and enhanced access to high bandwidth services such as ADSL, it declined to require subloop unbundling because of technical concerns raised by ILECs.[28] The Commission elected, instead, to allow states to address subloop unbundling on a case-by-case basis, and to "revisit the specific issue of subloop unbundling sometime in 1997."[29]

In retrospect, this approach has proven to be less than effective in promoting facilities-based residential telephone competition. Although a few states have recognized that opening up MDU distribution facilities to CLECs can enhance significantly the number of competitive choices available to consumers,[30] states have, by and large, declined the Commission's invitation to take up subloop unbundling. This is unfortunate because the Commission's concerns regarding the technical feasibility of subloop unbundling in 1996 were unfounded, and they remain unfounded today.

There are no substantial reliability or security concerns associated with unbundling subloop elements. For the most part, such unbundling will involve passive network elements that can have little or no impact on overall network reliability or security. Indeed, in the case of MDU on-property distribution facilities, the element to be unbundled is beyond the point at which the last active ILEC loop element is located. It is simply inconceivable that the provision of this element as a UNE can pose a technical concern.[31]

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28 11 FCC Rcd at 15696.

29 Id.

30 See Irvine Apartment Communities v. Pacific Bell, Case No. 98-02-020 (Cal. PUC, Dec. 3, 1998) (attachment 4); In the Matter of the Commission, On Its Own Motion, To Determine Appropriate Policy Regarding Access To Residents Of Multiple Dwelling Units In Nebraska By Competitive Local Exchange Telecommunications Providers, App. No. C-1878/PI-23 (Nebraska PSC, Mar. 2, 1999) (attachment 5).

31 The Commission has concluded in the past that access to a UNE may be "technically feasible" even if it "requires a novel use of, or some modification to," the ILEC network. First Interconnection Order, 11 FCC Rcd at 15605. Otherwise, the purposes of the 1996 Act would be frustrated because ILECs did not design their networks to accommodate competitive entry. Id.

Practical experience bears this out. As the Commission has noted, "successful interconnection or access to an unbundled element at a particular point in a network, using particular facilities, is substantial evidence that interconnection or access is technically feasible at that point."[32] In the case of MDU on-property distribution facilities, these facilities have been, and are being, made available to OpTel and other CLECs in some markets where the ILEC has been directed or compelled to do so.

For example, in Texas, OpTel encountered a number of MDU properties that were configured to multiple demarcation points. Following a series of discussions, SBC Communications Inc. ("SBC") agreed to reconfigure certain properties to a single SPOI, and to allow OpTel to cross-connect at the SPOI. At these select properties, where OpTel is now providing a competitive telephone service, there have been no significant technical or network reliability issues.

Similarly, as set forth in the attached decision of the California PUC, Pacific Bell has been ordered to reconfigure its MDU distribution network so as to relocate the demarcation point and to make the reconfigured on-property distribution network available to competing providers.[33] There has been no indication that compliance with the California PUC's policy has resulted in technical problems for the network.

In sum, ILEC networks can be modified to permit access to MDU on-property distribution facilities at an SPOI, and those distribution facilities can be provided to new entrants without risk to the network. Given that new entrants such as OpTel are prepared to bear a fair share of the costs of such reconfiguration, there can be no pro-competitive justification consistent with the purposes of the 1996 Act for the Commission to decline to identify this distribution element as a UNE.

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32 First Interconnection Order, 11 FCC Rcd at 15606; see also id. at 15602 (preexisting interconnection or access at a particular point evidences the technical feasibility of interconnection or access at substantially similar points").

33 See Irvine Apartment Communities v. Pacific Bell, Case No. 98-02-020 (Cal. PUC, Dec. 3, 1998). Pacific Bell has appealed that decision and OpTel, among others, has been compelled to litigate the issue in order to gain access to customers in California.

### 3. The Commission has authority to require ILECs to reconfigure MDU on-property distribution facilities and to unbundle those facilities as UNEs.

The Commission clearly has authority to identify subloop distribution elements as UNEs, and to order ILECs to reconfigure those elements upon request so as to make them practically available. Pursuant to Section 251, ILECs are required to provide UNEs "in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."[34] In interpreting this requirement, the Commission has concluded that some modification of ILEC facilities is encompassed within the duty imposed by Section 251(c)(3).[35]

On this basis, the Commission concluded in its First Interconnection Order that ILECs are required to take steps necessary to allow a competitor to combine its own facilities with the ILEC's UNEs, including providing cross-connect facilities and making other network modifications.[36] The Supreme Court did not, in its Iowa Utilities decision, question that conclusion or challenge in any manner the rational supporting it.

Further, to the extent that any network reconfiguration is required, the costs of the reconfiguration will be shared by the carriers concerned and, in the case of new properties, CLECs will similarly be required to configure on-property networks to provide single-point cross connect access to any unit on the property. Thus, whatever burden this imposes upon ILECs will shared by CLECs and the benefits of pro-competitive network configuration will inure to ILECs as well as to CLECs. The proposed unbundling, therefore, is entirely consistent with the letter and spirit of Section 251.

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[34] 47 U.S.C. § 251(c)(3).

[35] See First Interconnection Order, 11 FCC Rcd at 15692; see also id. at 15647 ("We do not believe it is possible that Congress having created the opportunity to enter local telephone markets through the use of unbundled elements, intended to undermine that opportunity by imposing technical obligations on requesting carriers that they might not be able to readily meet.").

[36] Id. at 15693.

## IV. The Commission Should Not At This Time Make Any Decisions Regarding The Possible Sunset Or Removal Of Network Elements From The List Of Identified UNEs.

In the NPRM, the Commission has sought comment on whether it should adopt a "sunset" provision under which "unbundling obligations for particular elements or all elements would no longer be required, upon the passage of time or occurrence of certain events, without subsequent action by the Commission."[37] Similarly, the Commission has asked for comment on the establishment of a "mechanism by which network elements would no longer have to be unbundled at a future date" or whether states should be given authority to adopt such a mechanism.[38] Because it is premature to judge the future need for any element to be identified as a UNE, OpTel urges the Commission not to adopt sunset/removal rules or policies at this time.

The premise of any sunset provision is that the regulatory authority can assume that at some given time in the future the regulation at issue no longer will be needed. At this time, while the Commission still is wrestling with identifying the network elements that should be unbundled under present market conditions, it has no basis to anticipate whether those UNEs will continue to be needed in the future. It simply is premature at this time to assume that, at some arbitrary time, any or all of the UNEs identified in this proceeding will not be required by new entrants.

It is likewise premature to establish mechanisms, or to allow states to establish mechanisms, for the removal of network elements from the list of UNEs. The local exchange and access markets are extremely fluid and changing at this time. The pace of change can only be expected to increase following the Commission's action in this and related proceedings. Moreover, the technologies used to provide telecommunications services are evolving at an unprecedented rate. As a result, neither the Commission nor the states are in a position to predetermine the standards that should apply to, or the showing that should be required for, a petition for the removal of a network element from the list of UNEs.

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[37] NPRM ¶ 39.
[38] Id. ¶¶ 36-38.

The Commission will, in this proceeding, establish standards for identifying UNEs under Section 251. If, at some future time, an ILEC believes that an identified UNE no longer satisfies those standards, it may petition the Commission for a modification of its UNE rules and policies. The Commission then will have an opportunity to rule on that petition with a full appreciation for the prevailing state of the market and the availability of competing telecommunications technologies.

In short, this proceeding should be focused on the adoption of appropriate standards and the identification of UNEs. The Commission should save for another day questions surrounding the sunset or removal of network elements from the UNE list.

## CONCLUSION

By facilitating access to the on-property distribution subloop element, the Commission would, within a very short time, make competitive telephone choices available to millions of residential subscribers living in MDUs and to commercial subscribers in multi-tenant buildings. This one step is the single fastest way to promote facilities-based residential telephone competition, and it is fully consistent with the Iowa Utilities decision. The Commission should, therefore, identify subloop elements as UNEs under Section 251 and require the reconfiguration of on-property distribution networks as set forth in these comments and the accompanying proposed rules.

Respectfully submitted,

OPTEL, INC.

/s/ W. Kenneth Ferree
W. Kenneth Ferree

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May 26, 1999

# Attachment 1

## (Proposed Rule Changes)

## PROPOSED RULES

**51.319 Specific unbundling requirements.**

(a) *Local Loop.* The local loop ....

(b) *Network Interface Device.* (1) The network interface device ....

(c) *Subloop Elements.* Incumbent LEC feeder facilities, incumbent LEC distribution facilities, and incumbent LEC feeder/distribution interface device, defined as:

(1) Feeder facilities include ...

(2) Distribution facilities include the physical transmission facility between a feeder/distribution interface device (or its equivalent) and a subscriber's CPE. On MDU properties, the on-property distribution facilities shall comprise a separate network distribution element, which shall be configured or reconfigured as follows:

(i) On MDU properties built or substantially reconfigured after (date the rules are adopted), LECs that install on-property distribution facilities shall ensure that those facilities terminate at a single point of interconnection ("SPOI") at or near the MDU property line.

(ii) On MDU properties built before (date the rules are adopted) and which have not been substantially reconfigured after that date, an incumbent LEC shall reconfigure on-property distribution facilities so that they terminate at an SPOI at or near the MDU property line upon election of the incumbent carrier or a competing carrier, or upon a *bona fide* request by the building owner/manager or a telecommunications carrier as its agent.

(A) Requests for the establishment of an SPOI shall be implemented by the incumbent carrier serving the property in the most expeditious and cost-effective manner possible. Absent agreement of the affected parties

to an alternative schedule, the SPOI shall be established within (a) 120 days for multi-building (campus) properties or (b) 60 days for single building properties.

(B) If the carrier requesting the reconfiguration of the property elects to perform the work to establish the SPOI, the incumbent LEC will cooperate with the requesting carrier and facilitate the reconfiguration in the most expeditious manner reasonably possible.

(C) The initial cost of reconfiguring a property to an SPOI shall be paid by the party making the request. Within five years of the establishment of the SPOI, any subsequent carrier (including an incumbent LEC) that obtains access at such SPOI shall reimburse, on a *pro rata* basis, the carrier that initially paid for such SPOI establishment based on the actual cost of the reconfiguration.

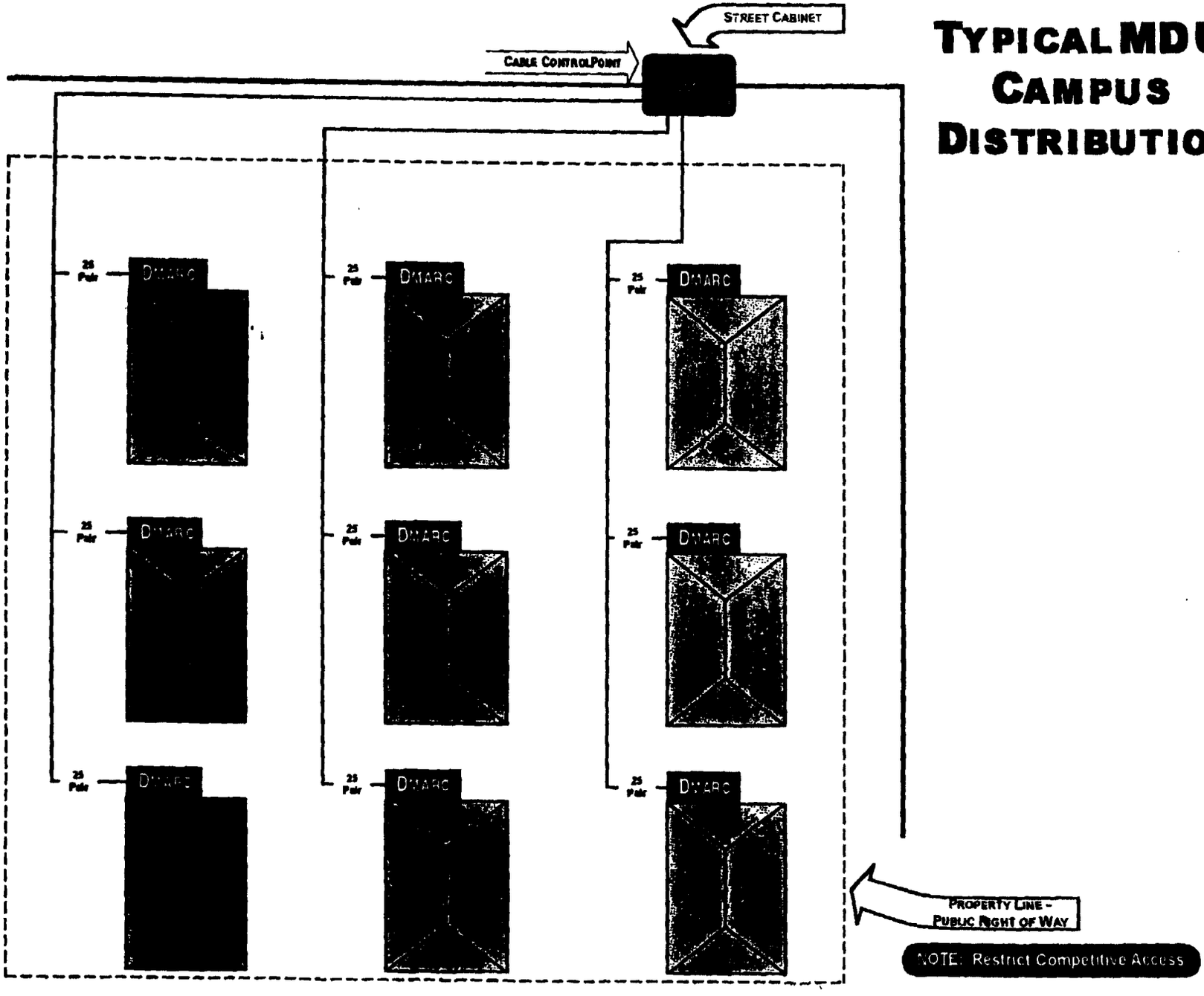
(D) The carrier serving the property and any other carriers seeking access to the property through the SPOI shall work with the property owner/manager to determine the location of the SPOI site and shall use, wherever possible, existing easements and rights of way.

(E) Following reconfiguration, the owner of the on-property wire may assess a charge for the maintenance of such wire, but such compensation shall be fair, reasonable, uniform, nondiscriminatory, and cost-based.

# Attachment 2

## (MDU Configuration Using Multiple Demarcation Points)

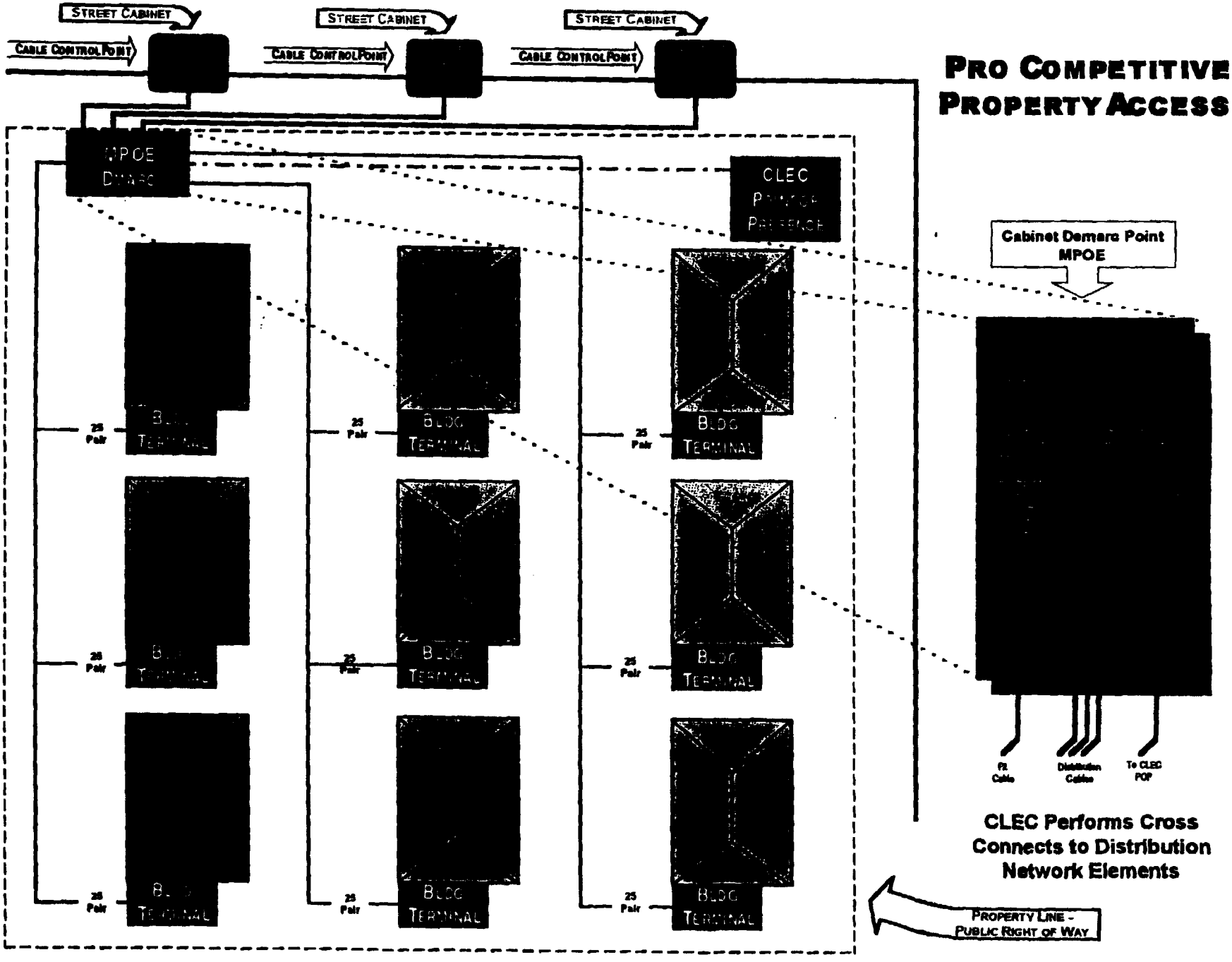
# TYPICAL MDU CAMPUS DISTRIBUTION



# Attachment 3

## (MDU Configuration With A Single Point Of Interconnection)

# PRO COMPETITIVE PROPERTY ACCESS



# Attachment 4

**(Irving Apartment Communities v. Pacific Bell)**

COM/JXK/mak

Mailed 12/9/98

Decision 98-12-023 December 3, 1998

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

| | |
|---|---|
| Irvine Apartment Communities, Inc., by and through its agent, CoxCom, Inc., dba Cox Communications Orange County, and Cox California Telcom, Inc.,<br><br>Complainants,<br><br>vs.<br><br>Pacific Bell,<br><br>Defendant. | Case 98-02-020<br>(Filed February 13, 1998) |

Lee Burdick, Attorney at Law, for complainants.
Colleen M. O'Grady, Attorney at Law, for defendant.

## OPINION

### 1. Summary

Complainants allege that Pacific Bell (Pacific) was required by statute, by its tariffs, and by Commission decisions to reconfigure network cable at the request of a multi-unit commercial property owner so as to relocate the demarcation point separating the property owner's facilities from those of Pacific. Complainants further allege that once the demarcation point is relocated, by operation of law, the property owner assumes responsibility for the maintenance and repair of the network cable between the original demarcation point and the new demarcation point.

Pacific responds that it is not required by statute, by law or by its tariffs to comply with a request to relocate a demarcation point. Further, Pacific responds that should it be required to do so, the action would constitute a "forced sale" of its network cable, in violation of its tariffs.

Complainants have met their burden of showing a violation of Public Utilities (PU) Code § 453, as well as a violation of a Commission order. Further, complainants have demonstrated a need for Pacific to revise its tariffs so as to conform with § 453 and Decision (D.) 92-01-023. The relief the complainants request is granted; we hereby enjoin Pacific from refusing to or failing to reconfigure its telecommunications facilities at the request of the property owner.

## 2. Procedural History

This case was filed on February 13, 1998. Notice of the filing appeared in the Daily Calendar on February 18, 1998. A prehearing conference was held on April 1, 1998. In a Scoping Memo dated April 7, 1998, Commissioner Knight named Administrative Law Judge Walker as presiding officer for hearing. An evidentiary hearing was conducted June 9-12, 1998, at which time the Commission heard from six witnesses and received 21 exhibits into evidence. The case was deemed submitted on July 27, 1998, following receipt of opening and reply briefs.

## 3. Background

In September 1997, complainant CoxCom became the agent for Irvine Apartment Communities (IAC) for the purpose of developing advanced telecommunications systems at 45 IAC apartment complexes in and around Orange County, California. CoxCom provides cable television service in Southern California, including cable service to the IAC properties. CoxCom and IAC intended to open the properties to telephone service providers other than

Pacific. Cox California Telcom II, L.L.C., an affiliate of CoxCom, stood ready to provide local exchange service in competition with Pacific.

As agent for IAC, CoxCom in the fall of 1997 asked Pacific to reconfigure telephone cabling at an initial eight of the IAC properties to enable Cox California Telcom and others to offer telephone service to residents. Under the proposal, IAC would pay Pacific's reasonable costs of reconfiguration.

The key to CoxCom's proposal was that, at each IAC property, Pacific would rearrange its cable to provide a single point of entry near the perimeter of each property to which Cox California Telcom could cross-connect. The single point of entry or demarcation point on commercial property is known as the Minimum Point of Entry (MPOE) or the Local Loop Demarcation Point (LLDP ).[1] Under both Federal and California law, the MPOE is the point at which the network cable and facilities of the telephone utility and those of the property owner meet.

In November 1997, Pacific notified CoxCom that only one of the eight designated properties had a single MPOE lending itself to cross-connection in the manner sought by CoxCom on behalf of IAC. At each of the other seven properties, Pacific identified a primary MPOE and one or more additional or "secondary" MPOEs, with all of the MPOEs located at individual buildings on the properties. At hearing, the parties agreed that four of the 45 IAC properties have a single MPOE and 41 of the properties have multiple MPOEs. (Complainants subsequently arranged cross-connect facilities and began offering service at the four properties that have single MPOEs.)

[1] In the case of residential property, the demarcation point is the Standard Network Interface, or SNI.

On behalf of IAC, CoxCom requested that Pacific relocate the MPOEs, asserting that Pacific was required by law and by tariff to honor the reconfiguration request of the property owner, provided the owner would pay for the work and the request was technically feasible. CoxCom stated further that once the cable had been reconfigured and a single MPOE was established, all cable on the owner's side of the MPOE would as a matter of law become the responsibility of the property owner. CoxCom also stated that, pursuant to a settlement adopted in our D.92-01-023, Pacific could recover the value of the cable from all ratepayers through accelerated depreciation of the equipment.

Pacific responded to IAC's request by asserting that the telephone cable leading to the primary and secondary MPOEs was network cable, since in each case the cable connected in a local loop to Pacific's central office facilities. Pacific stated that this cable was and is owned by Pacific, is used and useful in serving Pacific customers, and that Pacific was neither willing nor required to sell its network cable to the property owner for purposes of reconfiguration. As an alternative, Pacific proposed an access agreement between itself and Cox California Telcom by which Cox California Telcom could connect to Pacific's network facilities in order to offer service to end users.

## 4. Issues Before the Commission

Because this is a complaint case, the Commission's principal inquiry is whether Pacific violated "any provision of law or of any order or rule of the Commission." (PU Code § 1702.) The Commission's inquiry involves the following principal questions:

1. Has Pacific engaged in anticompetitive or discriminatory conduct in violation of PU Code § 453 by refusing to reconfigure cable at 41 of the IAC properties in the manner requested by complainants?

2. Is Pacific required by its tariffs or by the settlement adopted in D.92-01-023 (1992 settlement) to relocate and reconfigure the MPOEs on IAC's property?

3. If Pacific is required to relocate and reconfigure the MPOEs as IAC requests, does Pacific retain ownership of any cable and/or facilities which remain on the property owner's side of the new MPOE?

As discussed more fully below, this decision concludes that Pacific is required by § 453 and by the terms of the 1992 Settlement to relocate the MPOE on IAC's property at IAC's request, provided that IAC pays for the reconfiguration. In addition, we conclude that, once the MPOEs on IAC's properties are relocated and reconfigured as IAC requests, by operation of law the facilities on IAC's side of the MPOE become the property of IAC. Thus, contrary to Pacific's claims, reconfiguration of Pacific's existing MPOEs at the request of a property owner does not constitute a forced sale of Pacific's property. Further, because Pacific is not disposing of property "necessary or useful in the performance of its duties to the public," we conclude that § 851 of the Public Utilities Code is not invoked or applicable to the facts presented here.

## 5. Deregulation of Telephone Wiring

Requirements for establishing demarcation points, or MPOEs, at multi-unit properties (also called "continuous properties") like those of IAC are governed by regulations adopted by this Commission and by the Federal Communications Commission (FCC).

On June 14, 1990, the FCC released a report in CC Docket No. 88-57 establishing a new definition for demarcation points.[2] This Commission in

[2] The FCC's definition of "demarcation point" is contained in the Code of Federal Regulations as follows:

*Footnote continued on next page*

D.90-10-064 and D.92-01-023 added clarification to the demarcation point ruling, including approval of a Demarcation Settlement Agreement (1992 Settlement) among Pacific and other parties. The terms of the 1992 Settlement, which became effective on August 8, 1993, were intended to foster competition by transferring ownership of certain telecommunications facilities to property owners. The property owners then would become responsible for maintaining and repairing their telecommunications facilities, using whatever service provider the owners choose.

For multi-unit properties built or extensively remodeled after August 8, 1993, the rules of the Settlement required Pacific to establish a single MPOE as close as practical to the property line. The MPOE became the physical location where the telephone company's regulated network facilities ended and the point at which the building owner's responsibility for cable, wire, and equipment began. Pursuant to the 1992 Settlement, and to the FCC's rules, facilities on the building owner's side of the MPOE are designated as Intrabuilding Network Cable, or INC. In all instances, INC was, and is, to be owned by the property owner.

For existing buildings -- that is, those constructed before August 8, 1993 -- Pacific was required to convey to property owners any cabling that was identified as INC on Pacific's books.[3] Pacific's investment in this transferred INC

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Demarcation point: The point of demarcation and/or interconnection between telephone company communications facilities and terminal equipment, protective apparatus or wiring at a subscriber's premises. (47 C.F.R. Part 68.3.)

[3] The Demarcation Settlement Agreement defined INC as "sheathed cables located on utility's side of the current demarcation point inside buildings or between buildings on one customer's continuous property." (See D.92-01-023, Appendix A, p. 10.) The INC that the local carriers were obligated to relinquish was identified by their then-existing

*Footnote continued on next page*

was to be recovered over a five-year amortization period (from August 1993 to August 1998) from the general rate base.

Pacific Bell did not rearrange its demarcation points at the pre-1993 multi-unit properties owned by IAC and at issue here. Pacific contends that the law did not require it to do so then, nor does the law require it to do so now. Generally, the company's practice prior to 1993 was to install a local loop demarcation point at each building in a multi-unit complex. This means that Pacific maintains ownership (and responsibility) for underground cables that may run hundreds of feet into multi-unit property until reaching an MPOE. It also means that competing telephone companies have no single point at which to cross-connect to the owner's cabling in these properties. Other carriers are free, of course, to purchase and install their own cable at these properties.

**6. Applicability of PU Code § 453**

Complainants contend that Pacific violated the nondiscrimination provisions of PU Code § 453 because its "failure to act upon IAC's request and to reengineer its MPOE and construct a cross-connect facility prohibits Cox and other (competitive local carriers) from competing against Pacific, and thus subjects Cox and other CLCs to prejudice and unfair competitive disadvantage with respect to Pacific." (Complaint, ¶ 40.) Pacific denies these claims, asserting that different legal standards apply to existing and to new continuous property. Pacific says it has met the relevant standard for IAC's property.

PU Code § 453 reads in relevant part as follows:

> (a) No public utility shall, as to rates charges, service, facilities, or in any other respect, make or grant any preference or advantage to any

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specified accounting treatment, i.e., that which was booked to "Part 32 capital account 2426 and expense account 6426." (Id., at p. 10.)

> corporation or person or subject any corporation or person to any prejudice or disadvantage.

In the hearings in this case, Pacific's witness Michael Shortle testified that Pacific has, in fact, received requests from continuous property owners to move the MPOE or to add an MPOE. (3 RT 299-300.) Explaining that a move is "typically . . . for remodeling purposes," Mr. Shortle went on to explain the circumstances under which Pacific has responded to such requests. His answer was couched in the language of Pacific's tariff A2, 2.1.20(B)(4)(d), which reads as follows:

> If a property owner desires an additional Local Loop Demarcation Point(s) at a specified location on a customer's premises for specific purposes of providing service assurance, safety, security and privacy of data communications over the cable (generally known as "Direct Feed"), the owner will be required to pay for additional network cable and network facilities through special construction arrangements. In particular, additional Local Loop Demarcation Points cannot be used to extend any cable pairs served from any Local Loop Demarcation Point from one location to another location. (Emphasis added.)

We see from Mr. Shortle's testimony, as well as from Pacific's Response to Appeal, that Pacific has honored a customer's request to relocate an MPOE if the customer was remodeling continuous property. (See Pacific's Response to Appeal, p. 10, fn. 12.) Mr. Shortle's apparent reliance on Pacific's tariff Schedule Cal. P.U.C. No. A.2.1.20(B)(4)(d) for justifying the disparate treatment is misplaced. Tariff A.2.1.20(B)(4) refers to "Exceptions" to placement of the LLDP. Tariff A.2.1.20.(B)(3) states that the LLDP "is located at the MPOE/MPOP to any single or multi-story building, and includes the Utility's entrance facility, except as set forth in 4. Following." Thus, B.4 simply says that the LLDP need not be located at the MPOE/MPOP if the property owner requests that it be located elsewhere for reasons of "service assurance, safety, security, and privacy of data

communications." Further, if the property owner requests that the LLDP be located at some place other than at the MPOE/MPOP, the property owner must pay for "additional network cable and network facilities through special construction arrangements."[4] This language cannot support Pacific's claim that it may honor one customer's request and reject another customer's request when the essential changes being requested are substantially similar.

More importantly, we note that the 1992 Settlement contains the following provision:

> The utilities' tariffs will specify under what conditions additional Local Loop Demarcation Points will be allowed. (43 CPUC2d at 128, D.92-01-023, Appendix A, § IV.D(3).)

We note also that Pacific's tariffs do not contain any provision which specifies "under what conditions additional Local Loop Demarcation Points will be allowed". In failing to file a tariff which addresses the conditions under which Pacific will allow additional LLDPs or MPOEs, Pacific has failed to comply with this provision of the 1992 Settlement. Further, because Pacific has not incorporated into its tariffs any standards which would govern under what circumstances Pacific will "allow" a customer to add an MPOE, Pacific seems to assume that it can decide arbitrarily whether or not it will comply with a continuous property owner's request to add an MPOE. If a utility is arbitrarily honoring one customer's request for a service, but denying a similarly-situated customer the same service, the utility is engaging in discriminatory activity in violation of § 453. We conclude that Pacific has acted in a discriminatory manner by failing to incorporate standards for adding MPOEs into its tariffs, and then

[4] We note that the language in A.2.1.20(B)(4)(d) requiring the customer to pay for the added facilities parallels the language in tariff A.2.1.20(E)(5).

honoring one customer's reconfiguration request but denying another similarly-situated customer's request.

Pacific further asserts that it can refuse IAC's request because "[n]either the special construction tariffs [A2, 2.1.36(B)(e)] nor [D.92-01-023] required Pacific to honor any and all requests for changes to existing demarcation points on continuous property built before August 8, 1993." (See Pacific's Response to Appeal, p. 11.) We disagree. By relocating an MPOE for another customer, but failing to do so for IAC, Pacific is performing a service and granting a preference for one "corporation or person . . . to the prejudice or disadvantage" of another. (PU Code § 453.) Given that Pacific has failed to establish any "condition" for adding an LLDP, we also see no reason why a customer's decision to remodel its premises should be the factor which determines whether Pacific honors or denies that customer's request to reconfigure an existing MPOE or to add an MPOE. We do not construe remodeling of property to constitute a substantial difference which would justify disparate treatment of similarly-situated customers. Were Pacific still a monopoly provider, we could not condone its attempt to advantage one customer at the expense of another. We can no more readily condone this type of behavior in the newly emerging competitive markets for telecommunications and electric services.

By its refusal to comply with IAC's request, Pacific is preventing other telecommunications service providers from gaining equal access to IAC's properties for purposes of providing local exchange and other telecommunications services. As CoxCom explained, by reconfiguring the facilities on IAC's properties, all telecommunications providers, including Pacific, will be able to compete to offer service directly to the occupants of IAC's properties. (See Exhibits F and I to IAC's Complaint.) If we allow Pacific to exclude other providers from equal access to IAC's properties, we would be

contravening the policies established in the Commission's 1993 Infrastructure Report,[5] as well as D.96-03-020 and other subsequent orders in the Local Competition docket (R.95-04-043/I.94-04-044) intended to foster competition in all segments of the telecommunications marketplace.

Further, we note that in D.98-10-058, our recent order in the Local Competition docket on rights-of-way (ROW), we addressed the issue of third-party access to customer premises. There we stated that we are prohibiting all carriers from entering arrangements with private property owners that would effectively restrict the access of other carriers to the owners' properties or would discriminate against the facilities of other carriers, such as CLCs.

> For example, an agreement which provides for the exclusive marketing of ILEC services to building tenants may be improper if the agreement has the effect of preventing a CLC from accessing, and providing service to, a building because of the building owner's financial incentives under the marketing agreement. Similarly, a situation in which a building owner, either for convenience or by charging disparate rates for access, favors the access of the ILEC to the detriment of a CLC will also be in violation of our rules herein. Such arrangements conflict with our stated policy promoting nondiscriminatory ROW access. (D.98-10-058, mimeo., p. 100.)

We have now adopted a policy which prohibits property owners from discriminating against providers of telecommunications services. Given that, allowing an ILEC to refuse a property owner's request for facilities' reconfiguration intended to allow access to the property by other providers would frustrate our policy against discrimination. It would, instead, allow the ILEC to discriminate by preventing the property owner from obtaining

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[5] Enhancing California's Competitive Strength: A Strategy for Telecommunications Infrastructure, November, 1993.

telecommunications service(s) from alternate providers as has occurred in the case before us.[6]

We reject Pacific's claim that it may relocate an MPOE at one customer's request, but refuse a comparable claim from another customer, and find that PU Code § 453 specifically prohibits just this type of discrimination among customers. We direct Pacific to file a tariff which contains the conditions under which an owner of continuous property may request reconfiguration of existing MPOEs or the adding of MPOEs.

## 7. Treatment of MPOE at Pre-1993 Properties

Complainants argue that the manner in which Pacific locates MPOEs on continuous property leaves "a significant amount of cable on the utility's side of the MPOE to which Pacific denies the owner control or access, and to which CLCs are denied access, [and thus] is inherently unreasonable and discriminatory". We conclude that the issue is not where Pacific located MPOEs on property treated as "existing" pursuant to the 1992 settlement. The settlement required utilities to unbundle Intrabuilding Network Cable, or INC, on all continuous property, both commercial and residential. (D.92-01-023, 43 CPUC2d 115, 124-25.) Once INC was unbundled, the property owner would assume responsibility for the maintenance and repair of INC on the property owner's side of the MPOE. (Id.) Because the settlement involved a conveyance

[6] We recognize that Pacific offered to enter into a "co-carrier" agreement with CoxCom to enable CoxCom to use Pacific's facilities to reach customers residing at IAC's properties. In effect, this would require CoxCom and other competitors to lease facilities from Pacific, thus making Pacific the gatekeeper for competitors wishing to serve customers at IAC's properties. Notwithstanding potential implications pertaining to the 1996 Federal Telecommunications Act regarding unbundled access, we consider this type of arrangement to be less than optimal. We prefer arrangements which allow all providers equal access to end users.

of facilities from utilities to property owners, the settlement provided for the utilities to be reimbursed for the value of the transferred facilities through a depreciation formula adopted in D.92-01-023. (Id. at 129-30.)

The 1992 settlement did not require utilities to relocate MPOEs on existing property at the time the settlement became effective. Nor did the settlement require utilities to reconfigure facilities on existing property so as to create a single MPOE. The settlement, however, did mandate that utilities "designate the main distribution terminal which is the Local Loop Demarcation Point [or MPOE], for each local loop serving the property, for purposes of the unbundling of INC in each building". (Id. at 128.) It appears from the record before us that Pacific did designate a "main distribution terminal" or MPOE for each of the IAC properties which are the subject of this complaint.

Whether Pacific was required to move MPOEs on existing property in 1993, however, is a different question from whether Pacific is now obligated by the terms of the 1992 settlement or by its tariffs to relocate the MPOEs at the request of the property owner. We note that Section IV of the settlement was entitled "Proposed Locations of Demarcation Points." That section contains definitions of the Local Loop Demarcation Point (LLDP) (Section IV.A), the INC Demarcation Point (Section IV.B), and the Inside Wire Demarcation Point (Section IV.C). (43 CPUC2d 115, 127-28.) Section IV.D of the settlement is entitled "Location of Demarcation Points on Continuous Property." Section IV.D(1) addresses demarcation points (LLDPs or MPOEs) on "new continuous property," which was property built or remodeled on or after August 8, 1993. Section IV.D(2) addresses demarcation points on "existing continuous property," which was property existing before August 8, 1993. Section IV.D(3) is set forth below.

> 3. If a continuous property owner desires additional Local Loop Demarcation Points or changes in existing Local Loop Demarcation Points, the owner will be required to pay for the additional network cable and network facilities required to install the additional Local Loop Demarcation Points through special construction agreements in accordance with the utility's special construction rules in the utility's exchange tariffs, except as provided in Section VIII.C.3, below.[7] The utilities' tariffs will specify under what conditions additional Local Loop Demarcation Points will be allowed. In particular, additional Local Loop Demarcation Points cannot be used to extend any cable pairs served from any LLDP from one location to another.[8]

Section IV.D(1) refers explicitly to "new continuous property," and Section IV.D(2) refers explicitly to "existing continuous property." In contrast, Section IV.D(3) refers simply to "continuous property." The lack of specificity leads to two possible interpretations of Section IV.D(3): the section refers to both existing and new continuous property, or the section does not refer to either new or existing continuous property. We reject the latter interpretation as it would give no effect to the entire section, and we must, if at all possible, construe the language of the settlement to have meaning. Therefore, we conclude that Section IV.D(3) applies to both new and existing continuous property.

Section IV.D(3) states quite plainly that if a continuous property owner "desires additional . . . or changes in existing" demarcation points (LLDPs or

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[7] The exceptions addressed in Section VIII.C.3 are inapplicable in this case.

[8] Pacific's tariff Schedule Cal.P.U.C.No.A2.1.20.E.5 contains language virtually identical to the first sentence of Section IV.D(3):

> Where an owner of continuous property requests additional local loop demarcation points or changes [in] an existing local loop demarcation point, the owner will be required to pay for any additional network cable and facilities required through special construction agreements set forth in Schedule Cal.P.U.C. No. A2.1.36 except as provided in B.4. preceding.

MPOEs), the owner must pay for the "additional network cable and network facilities required to install the additional" LLDPs. We interpret the word "additional" so as to include changed LLDPs as well new LLDPs. In light of our conclusion that Pacific is prohibited by § 453 from discriminating among customers seeking to reconfigure MPOEs, we further interpret this term of the 1992 Settlement to confer on the utility an obligation to effect changes to LLDPs or MPOEs if the customer requests a change, and so long as the customer pays for the cable and facilities required to effect the change.[9] At the same time, we recognize that a customer's request to add or change an LLDP or MPOE may not be technically feasible. In such a situation, the utility would be obligated to work with the customer to accommodate the customer's request in a manner that is technically feasible. Pacific has not asserted anywhere in the record before us that it is technically constrained from making the change requested, so we presume the changes IAC requests are technically feasible.

Pacific does claim, however, that its tariffs allow it to "consider requests for additional MPOEs and rearrangement of demarcation points on existing continuous property, but the tariffs do not require us to honor each and every such request." (See Pacific's Response to Appeal, p. 19.) Pacific cites to its tariff A2, 2.1.36 which refers to the "Special Construction of Exchange Facilities". Tariff A2, 2.1.36(B)(1)(e) does state that "[t]he provision of any of the above listed special construction shall be entirely at the option of the Utility [footnote omitted]". We have already concluded that because Pacific has honored the

[9] While we do not consider the language in Pacific's tariff to be ambiguous, to the extent that it does not explicitly require Pacific to make LLDP changes at a customer's request, we note that where a tariff is unclear or ambiguous, we construe the tariff against the utility. (45 CPUC2d 263, 269 (D.92-08-028), citing 4 CPUC2d 26, 33 [D.91934] and 60 CPUC2d 74, 75 [D.64022].)

request of one or more property owners to reconfigure MPOEs on existing continuous property, but is refusing to honor IAC's request, Pacific is acting in violation of § 453. Consequently, to the extent that Pacific's tariff allows it to discriminate between customers seeking to relocate one or more MPOEs on existing continuous property, Pacific must revise this tariff language.

The facts before us show that the property owner, IAC, entered into an agreement with "CoxCom, Inc., a Delaware corporation d/b/a Cox Communications Orange County" whereby CoxCom would provide telecommunications facilities and services to IAC. (See Exhibit B to IAC's Complaint.) CoxCom and IAC also entered into an agency agreement to enable CoxCom to act on IAC's behalf in arranging for Pacific to "provide a single Minimum Point of Entry" to IAC's properties. (See Exhibit A to IAC's Complaint.) On IAC's behalf, CoxCom repeatedly asked Pacific to reconfigure Pacific's facilities on the IAC properties so as to create a single MPOE as IAC requested. In its communications, CoxCom stated clearly that it was requesting a reconfiguration of Pacific's facilities on behalf of the property owner. (See Exhibits A, F, and I to IAC's Complaint.) In each instance, Pacific ignored the fact that CoxCom was acting as an agent for the property owner. Instead, Pacific insisted that CoxCom was seeking itself to purchase facilities from Pacific. Based on that premise, Pacific consistently refused to "sell" its facilities to CoxCom.

IAC has requested, and is entitled to obtain, a reconfiguration of telecommunications facilities on existing continuous property pursuant to both the terms of the 1992 Settlement as we interpret those terms in light of § 453. Pacific is entitled to be compensated for the additional network cable and facilities, again, pursuant to both the Settlement and Pacific's tariffs. IAC has stated its willingness to pay for the network cable and facilities required to effect the reconfiguration it requests. (See Exhibits F and I to IAC's Complaint.)

Despite this, Pacific continues to refuse to perform the reconfiguration a property owner has rightfully requested.

For these reasons, we reject Pacific's claim that IAC and/or CoxCom have requested to purchase Pacific's facilities. Rather, we order Pacific to effect promptly the reconfiguration IAC has requested.

## 8. Applicability of PU Code § 851

Pacific asserts that IAC's request for reconfiguration of MPOE's on IAC's properties constitutes a forced sale of Pacific's facilities, invoking PU Code § 851. In a letter to CoxCom's attorney, dated January 15, 1998, Pacific noted that in 1993, it "turned over to the building owner's control" the INC cable which existed on IAC's properties, but had retained Network Distribution Cable "as Pacific's cable". (See Exhibit G to IAC's Complaint.) We note also Pacific's configuration of its facilities on IAC's properties, which include "primary MPOEs" and "secondary MPOEs".

Neither the Settlement nor D.92-01-023 specifically addressed "primary" and "secondary" MPOEs. Indeed, we cannot find the words "primary MPOE [or LLDP]" and "secondary MPOE [or LLDP]" anywhere in the Settlement document. An MPOE, or LLDP, is defined in the Settlement as follows:

> 1. The purpose of the Local Loop Demarcation Point is to separate the responsibility of the utility from the responsibility of the building owner/customer by
>
>    a. designating the end of the local loop or end of the network facility and by
>
>    b. defining the beginning of the INC, if any, provided by the building owner.

2. The Local Loop Demarcation Point may also be referred to as the Minimum Point of Entry ("MPOE") or Minimum Point of Presence ("MPOP") for the purpose of defining the end of the network facilities provided by the utility.

3. The Local Loop Demarcation Point will be located at the point of entry at the entrance facility, except as set forth in Section VIII, below. Utilities will not be required to place LLDPs on more than one floor in a multi-story building.

Given that the LLDP or MPOE was and is intended quite plainly to separate the utilities' facilities from the property owner's facilities, we see no room within this definition for "primary" and "secondary" MPOEs. Since the MPOE is the dividing line between the facilities of two entities, the utility cannot continue to own facilities on the property owner's side of the MPOE. Such an arrangement is not discussed in the 1992 Settlement, by the comparable language in Pacific's tariff (Schedule Cal P.U.C. A.2.1.20(B)1) , or by the FCC's definition of MPOE.

Notwithstanding our conclusion that the Settlement cannot accommodate continued utility ownership of facilities on the property owner's side of the MPOE, we note that the entire question of primary and secondary MPOEs is mooted by our earlier conclusion that a property owner has the right to request, and Pacific must perform, a reconfiguration of the MPOE(s) on a customer's property. Thus, we do not decide here whether it was or was not appropriate for Pacific to designate both "primary" and "secondary" MPOEs on IAC's property. Rather, it is IAC's request to reconfigure the MPOEs which governs.

We do conclude here, however, that by operation of law Pacific cannot continue to own facilities on the property owner's side of the MPOE once the MPOE is reconfigured as IAC requests. Once the MPOEs on IAC's properties are reconfigured, and to the extent that the reconfiguration moves the MPOEs in the

direction of Pacific's facilities rather than towards the property owner's facilities, Pacific will no longer own the facilities on IAC's side of the MPOE. Thus, the facilities will no longer be used and useful to Pacific. Therefore, PU Code § 851 is not applicable, as it pertains to the disposition or encumbrance of property "necessary or useful in the performance of [the utility's] duties to the public."

Pacific claims that, pursuant to the 1992 Settlement, it was required to transfer only embedded INC to property owners.

> Neither the Settlement Agreement nor our implementing tariffs require us to relinquish or sell other useful network plant. Indeed, our tariffs expressly reserve our rights to retain network distribution cable for current or future use. (See Pacific's Response to Appeal, p. 22.)

Pacific relies on tariff language which reserves to Pacific "the right to . . . retain ownership of existing distribution cable facilities . . . that may be required for current or future use." (See Schedules Cal. P.U.C. A2, 2.8.1(D)(6); A8, 8.4.1(B)(3).) Because we conclude that Pacific must relocate the MPOEs on IAC's property as IAC requests, and any affected network distribution cable becomes by operation of law intrabuilding network cable, Pacific will no longer own the affected network distribution cable. Consequently, it cannot choose to retain ownership of facilities which, by operation of law, have transferred to the property owner.

This result is entirely consistent with the 1992 Settlement's treatment of the INC transferred to the incumbent utilities effective August 8, 1993. Pacific's network distribution cable was transferred to property owners, and became intrabuilding network cable. At that time, Pacific did not request review of the transfer of INC pursuant to § 851, nor did Pacific assert that it retained

ownership of the NDC. No § 851 review is necessary now.[10] Further, even if we were to apply § 851, no review of this transfer of facilities would be necessary, as the section states that no public utility will dispose of or encumber necessary or useful property "without first having secured from the commission an order authorizing it to do so." In D.92-01-023, by approving the 1992 Settlement, we authorized this very type of network reconfiguration at a customer's request.

This is not a forced sale of Pacific's facilities. Indeed, this is not a sale of facilities at all. Rather, this case involves a customer's request for reconfiguration of facilities and relocation of MPOEs on the properties. Indeed, in a letter to CoxCom, dated February 3, 1998, Pacific's attorney, Theresa L. Cabral, acknowledged that a sale of facilities was not at issue: "We do agree that Cox is not 'purchasing' any part of Pacific's distribution network". (See Exhibit J to IAC's Complaint.) In addition, Pacific's witness, Michael Shortle, testified in response to a question from Pacific's counsel as follows:

> Q. Does relocation of an MPOE involve sale of Pacific's network distribution cable to your knowledge?
>
> A. No, not to my knowledge.
> (Vol. 3, Reporter's Transcript [RT], p. 306.)

Despite these concessions, Pacific has continued to assert, even in its Response to IAC's Appeal, that CoxCom and/or IAC seek a "forced sale" of Pacific's facilities. In light of its own admission that relocating an MPOE does not involve or constitute a sale of network distribution cable, we find Pacific's claim to be without merit.

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[10] We disagree, however, with CoxCom's assertion that § 851 applies only to utility property transferred to another utility.

**9. Applicability of PU Code §§ 761 and 762**

Complainants claim that PU Code §§ 761 and 762 are invoked by their complaint. Sections 761 and 762 state in pertinent part as follows:

> 761. Whenever the Commission, after a hearing, finds that the rules, practices, equipment, appliances, facilities, or service of any public utility, or the methods of manufacture, distribution, transmission, storage, or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the Commission shall determine and, by order or rule, fix the rules, practices, equipment, appliances, facilities, service, or methods to be observed, furnished, constructed, enforced, or employed.
>
> 762. Whenever the Commission, after a hearing, finds that additions, extensions, repairs, or improvements to, or changes in, the existing plant, equipment, apparatus, facilities, or other physical property of any public utility...ought reasonably to be made, or that new structures should be erected...to secure adequate service or facilities, the Commission shall make and serve an order directing that such additions, extensions, repairs, improvements, or changes be made or such structures be erected in the manner and within the time specified in the order.

While these standards may be more applicable in a rulemaking proceeding, they nonetheless can be applied to a complaint case. Indeed, §§ 761 and 762 are often used in complaints raising environmental issues. We note also, however, that the language of these sections, on its face, is not limited to environmental issues. As competition unfolds in both the telecommunications and electricity markets, we may need to authorize parties to file complaints raising issues of fairness and equity pursuant to these sections. Because we are resolving this complaint on other grounds, we decline at this time to invoke these sections to support this complaint.

## 10. Recovery Of Pacific's Investment

Pursuant to the 1992 Settlement, Pacific transferred all INC to property owners. D.92-01-023 summarized the utilities' recovery of investment as follows:

> Recovery of embedded INC investment may be accomplished either by way of standard depreciation expense recovery over the remaining life of the investment, or by way of accelerated depreciation over five years. At the end of the recovery period, the utility will relinquish ownership of the embedded INC to the building owner and will retire the investment from its books of account. (43 CPUC2d at 117.)

Pacific's investment in the transferred INC was recovered over a five-year amortization period (from August 1993 to August 1998) from the general rate base.

We are presented here with the question of how Pacific should be compensated for the embedded facilities which will become INC, by operation of law, once Pacific completes the reconfiguration IAC has requested. Because Pacific is a utility subject to the New Regulatory Framework (NRF) we must assess any compensation in light of NRF rules.

Prior to implementation of NRF on January 1, 1990, the Commission performed an evaluation of Pacific's embedded rate base. This process was referred to as the "start-up revenue requirement." (34 CPUC2d 155, D.89-12-048.) All of Pacific's embedded rate base, including outside plant and facilities, were included in the start-up revenue requirement. Subsequently, in D.94-09-065, our decision in the Implementation Rate Design phase of NRF, we adjusted rates for all of Pacific's services based on the start-up revenue requirement. (See 56 CPUC2d 117.) Consequently, Pacific is already recovering its investment in the embedded facilities included in the start-up revenue requirement which Pacific will transfer to IAC once the MPOEs on IAC's properties are reconfigured.

Some of the properties at issue in this proceeding, however, may have been constructed since NRF was implemented on January 1, 1990. In that event, those embedded facilities would not be included in the start-up revenue requirement. Pacific is entitled to be compensated for its investment in those facilities. We direct Pacific to disclose and identify the specific facilities that will become INC after the MPOEs on IAC's properties are reconfigured. We will further order the Director of the Telecommunications Division to publicly notice a workshop within 30 days of this order. The subject of the workshop will be methods of determining the value of the post-NRF facilities that will convert to INC upon reconfiguration of the MPOEs on IAC's affected properties. Based on the results of the workshop, the Telecommunications Division shall make a recommendation in a draft resolution for the Commission to consider.

## 12. Covenant of Good Faith and Fair Dealing

Because we have resolved this dispute on other grounds, we need not reach the question of whether Pacific has violated the covenant of good faith and fair dealing.

## 13. Conclusion

We find here that Pacific has violated the terms of the 1992 Settlement by failing to file a tariff setting forth the conditions under which a continuous property owner may add MPOEs. Because Pacific has failed to establish in its tariffs any conditions for adding MPOEs, Pacific has relied solely on its discretion in determining which customer requests for reconfiguring or adding MPOEs to honor and which to deny. By honoring some requests and denying others for similarly-situated customers, with no standards set forth governing these determinations, Pacific has engaged in preferential or discriminatory conduct in violation of § 453 of the PU Code. In the newly-developing competitive telecommunications marketplace, we must discourage discriminatory activity,

especially when it prevents competitors from offering their services directly to customers, thus limiting customer choice. Therefore, we direct Pacific to honor the request by IAC to reconfigure its MPOEs so as to add a new MPOE closer to the property line of each of the affected IAC existing continuous properties. We also direct that Pacific is to be compensated for network facilities built after NRF began, that is, after January 1, 1990, at net book value of the facilities which transfer to IAC. We conclude that for properties built before NRF commenced, Pacific already is recovering through standard depreciation schedules the value of its facilities and no additional compensation is warranted.

**Findings of Fact**

1. CoxCom is the agent for IAC for the purpose of developing advanced telecommunications systems at 45 IAC properties in Southern California.

2. As agent for IAC, CoxCom in the fall of 1997 asked Pacific to reconfigure telephone cabling at IAC properties to provide a single demarcation point, or MPOE, to which other carriers, including CoxCom's affiliate Cox California Telcom, could cross-connect.

3. Four of the IAC properties have a single MPOE, but 41 of the properties have multiple MPOEs, commonly with one local loop MPOE reaching to each building on the properties.

4. Pacific refused the CoxCom/IAC request to reconfigure network cable into a single MPOE at IAC properties where multiple MPOEs existed, and to transfer ownership of the cable on the owner's side of the new MPOE to the owner.

5. CoxCom filed this complaint on February 13, 1998, alleging that Pacific is required by law, by Commission order, and by tariff to comply with the property owner's request and to convey reconfigured cable to the property owner.

6. Pacific has honored one or more customer's request to relocate, reconfigure, or add an MPOE.

7. The 1992 Settlement states that utilities' tariffs will "specify under what conditions additional" LLDPs or MPOEs will be allowed.

8. Pacific's tariffs do not specify the conditions under which a customer may add an MPOE.

9. Pacific has not asserted that the changes IAC requests are technically infeasible.

10. The 1992 Settlement states that if a continuous property owner desires additional MPOEs or changes in existing MPOEs, the property owner must pay for the additional network cable and network facilities required to install the additional LLDPs or MPOEs.

11. By reconfiguring the MPOEs as IAC requests, all telecommunications providers, including Pacific, will be able to compete to offer service directly to the occupants of IAC's properties.

12. In D.98-10-058, our decision in the Local Competition Docket concerning rights-of-way, we adopted a policy which prohibits property owners from discriminating against providers of telecommunication services other than incumbent local exchange carriers.

13. Hearing on the complaint was conducted on June 9-12, 1998, and the case was submitted on July 27, 1998, following receipt of opening and reply briefs.

## Conclusions of Law

1. The Commission's principal inquiry in a complaint case is whether there is a violation by the defendant of any provision of law or of any order or rule of the Commission.

2. Requirements for establishing MPOEs at continuous property are governed by regulations adopted by this Commission and by the FCC.

3. In D.92-01-023, the Commission approved a Settlement Agreement among Pacific and other parties, which contains a definition of Local Loop Demarcation Point (LLDP), also known as the Minimum Point Of Entry (MPOE).

4. The 1992 Settlement treated differently continuous properties built before August 8, 1993, and those built or extensively remodeled on or after August 8, 1993.

5. Pacific was required to create a single MPOE for continuous properties built or extensively remodeled on or after August 8, 1993.

6. For continuous properties built prior to August 8, 1993, known as "existing continuous property," Pacific was required to convey to property owners any cabling identified as Intrabuilding Network Cable, or INC, that had been booked by Pacific to Part 32 capital account 2426 and expense account 6426.

7. We interpret Section IV.D(3) of the 1992 Settlement to apply to both existing and new continuous property.

8. We interpret Section IV.D(3) of the 1992 Settlement so as to include changed LLDPs or MPOEs, as well as new LLDPs or MPOEs.

9. We further interpret Section IV.D(3) of the 1992 Settlement to confer on the utility an obligation to effect changes to LLDPs or MPOEs if the customer requests a change, so long as the customer pays for the network cable and facilities required to effect the change.

10. Because IAC's properties are existing continuous properties, Pacific is required by the 1992 Settlement and by § 453 to relocate the MPOE(s) on IAC's property at IAC's request, provided that IAC pays for the reconfiguration.

11. Pursuant to the definitions of MPOE established by the FCC (47 C.F.R. 68.3) and by the 1992 Settlement, the utility cannot continue to own facilities on the property owner's side of the MPOE once the MPOE on existing continuous property is reconfigured at the request of the property owner.

12. Once the MPOEs on IACs properties are relocated and reconfigured as IAC requests, by operation of law, the facilities on IAC's side of the MPOE become the property of IAC.

13. Reconfiguration of Pacific's existing MPOEs at the request of the property owner does not constitute a forced sale of Pacific's property.

14. Pacific is recovering the value of network facilities on IAC's properties built before January 1, 1990 as part of its start-up revenue requirement, which was established in D.89-12-048.

15. Pacific should be compensated for its network facilities on IAC properties built between January 1, 1990 and August 8, 1993.

16. Because Pacific is not disposing of property "necessary or useful in the performance of its duties to the public," § 851 is not applicable to the facts underlying this complaint.

17. Pacific has acted in a discriminatory manner by failing to incorporate into its tariffs, as required by the 1992 Settlement, standards for adding LLDPs or MPOEs, then by honoring requests by one or more customers to reconfigure MPOEs, but denying IAC's request.

18. Because it has refused to reconfigure and convey cable at IAC properties in the manner requested by complainants, and by failing to incorporate into its tariffs the conditions under which it will allow additional LLDPs or MPOEs, Pacific has violated the anti-discrimination provisions of P.U. Code § 453.

19. Complainants have met their burden of showing that Pacific has violated a law, rule, or Commission order.

20. The proceeding should be closed.

21. The Revised Complainants' Appeal of the Presiding Officer's Decision filed October 13, 1998 is granted to the extent discussed here.

C.98-02-020 COM/JXK/mak *

## ORDER

**IT IS ORDERED** that:

1. The complaint of Irvine Apartment Communities, Inc. (IAC), by and through its agent, CoxCom, Inc. dba Cox Communications Orange County, and Cox California Telcom, Inc., Complainants, vs. Pacific Bell (Pacific), Defendant, is granted.

2. Pacific is directed to reconfigure IAC's property as IAC requests, provided that Pacific is compensated both for any additional network cable and facilities, as well as for the facilities which convert to INC on any IAC properties built between January 1, 1990 and August 8, 1993. Pacific shall continue to recover, through standard depreciation schedules, the value of network facilities on IAC continuous properties built before January 1, 1990.

3. Pacific is further directed to file with the Commission, within 30 days of the date of this order, an advice letter establishing a tariff which specifies the conditions under which Pacific will add or reconfigure MPOEs on existing continuous property.

4. Pacific is further directed, within 30 days of the date of this order, to file documentation with the Director of the Telecommunications Division identifying the facilities that will become INC after reconfiguration of the MPOEs on IAC's existing continuous properties addressed by this complaint.

5. Within 30 days of this order, the Director of the Telecommunications Division shall publicly notice a workshop. The subject of the workshop will be methods of determining the value of the post-NRF facilities that will convert to INC upon reconfiguration of the MPOEs on IAC's affected properties. Based on the results of the workshop, the Telecommunications Division shall make a recommendation in a draft resolution for the Commission to consider.

6. The Revised Complainants' Appeal of the Presiding Officer's Decision is granted.

7. Case 98-02-020 is closed.

Dated December 3, 1998, at San Francisco, California.

RICHARD A. BILAS
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
Commissioners

I dissent.

/s/ HENRY M. DUQUE
Commissioner

I dissent.

/s/ JOSIAH L. NEEPER
Commissioner

# Attachment 5

## (Nebraska PSC Decision re: MDU Access)

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

| | |
|---|---|
| In the Matter of the Commission, on its own motion, to determine appropriate policy regarding access to residents of multiple dwelling units (MDUs) in Nebraska by competitive local exchange telecommunications providers. | ) Application No. C-1878/PI-23<br>)<br>)<br>) ORDER ESTABLISHING STATEWIDE POLICY FOR MDU ACCESS<br>)<br>) Entered: March 2, 1999 |

APPEARANCES:

For the Commission:
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Lincoln, NE 68508

For US West Communications:
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1801 California, Suite 1500
Denver, Co 80202

For Cox:
Jon Bruning
8035 S. 83rd Avenue
LaVista, Nebraska
and
Carrington Phillip
1400 Lakehearn Drive
Atlanta, Georgia

For the Community Associations Institute:
David Tews
1630 Duke Street
Alexandria, VA 22314

BY THE COMMISSION

On August 5, 1998, the Commission, on its own motion, opened this docket to determine appropriate policy regarding access to residents of multiple dwelling units (MDUs) in Nebraska by competitive local exchange telecommunications providers (CLECs). Notice of this docket was published in The Daily Record, Omaha, Nebraska, on August 10, 1998, pursuant to the rules of the Commission.

Cox Nebraska Telcom II, L.L.C. (Cox) previously filed a formal complaint (PC-1262) against US West Communications, Inc. (US West) with this Commission concerning access to residents of MDUs. Upon review of the complaint, the Commission was of the opinion that as competition developed further in Nebraska markets, it would be in the best interest of the public that the Commission develop a gene-

ral overall policy regarding access to MDUs. Therefore, the Commission opened this docket and Cox withdrew its complaint against US West.

The Commission began its investigation by requesting that all interested persons submit comments on this issue by September 8, 1998. On September 14, 1998, the Commission held a hearing on these issues in the Commission Hearing Room in Lincoln, Nebraska, with the appearances as shown above.

## E V I D E N C E

Carrington Phillip, vice president of Cox, testified as follows: Local exchange competition should not be something that is limited only to those who are fortunate enough to own their own homes. To resolve this issue, Cox believes that it is necessary to permit all certificated carriers who want to invest in serving tenants in MDUs the opportunity to efficiently do so. Cox suggested that the Commission develop a solution that removes artificial barriers related to historical network design and the incumbent's inherent monopoly power so that competition can flourish.

In facilitating implementation of competition in the provisioning of local exchange service, Cox suggested that its proposal would strike a regulatory balance between property rights of the incumbent local exchange carrier (ILEC) and the requirements established for state regulators in the Telecommunications Act of 1996 (Act).

Cox suggested that the ILEC should be ordered to establish a minimum point of entry (MPOE) as close to the edge of the MDU property line as possible. The ILEC could retain ownership of the cable, conduit, etc. between the demarcation point and the newly located MPOE, but should receive a reasonable one-time cost-based amount to move the MPOE to the property line. Furthermore, a CLEC should pay the ILEC a one-time fee equal to 25 percent of the replacement value of this cable, conduit, etc. for access. Replacement value should be defined as the new cost of the copper wire. Replacement cost should be estimated to be $4.20 per cable foot, based on the cost of 600 pair cable.

Maintenance and repair of the facility should be accomplished by a third-party contractor approved by the ILEC and the current service provider. The maintenance and repair would be performed in accordance with mutually agreed upon national standards with the cost borne by the ILEC and CLEC on a percentage basis.

Mr. Alan Bergman, Director of State Market Strategies for US West in Nebraska, testified as follows: US West agrees strongly that the tenants in MDUs should have choice. However, Mr. Bergman emphasized that other carriers currently have an opportunity to provide MDU customers with a choice. All local exchange carriers, including US West, are required under the Act to make available for resale at wholesale rates their retail services. Furthermore, nothing is preventing CLECs such as Cox from constructing their own facilities up to the demarcation point as US West has done. Either of these methods would provide choice for MDU residents.

US West proposes that competitors should be able to use a portion of the unbundled loop and the so-called sub-loop unbundling in order to provide local service to an MDU resident. This would require that a competitor pay the cost, a one-time non-recurring charge, for the installation of a new cross-connect box at a point agreed to by the owner near the property line where the facility comes into the MDU property. Then, beyond that, the competitor would pay an average cost-based rate determined through the cost docket for the portion of the unbundled loop that it uses.

Mr. David Tews, representing the Community Associations Institute, testified as follows: The Commission should recognize the self-determinate process and the role the community associations play in maintaining, protecting and preserving the common areas, the values of the community or the value in an individually owned property within the development. To fulfill these duties, community associations must be able to control, manage, and otherwise protect their common property.

## O P I N I O N A N D F I N D I N G S

After hearing testimony, reviewing briefs and other comments filed in this docket, the Commission believes that a statewide policy regarding CLEC access to residential MDUs is necessary to

protect the rights of MDU residents. The primary purpose of this order is to create a uniform framework that parties throughout the state, incumbents and competitors alike, can utilize to serve residents of MDUs. Such a statewide policy should foster competition while simultaneously providing the residents of MDUs a realistic opportunity to select their preferred telecommunications provider.

The National Association of Regulatory Utility Commissioners (NARUC) explicitly recognized the problem in its "Resolution Regarding Nondiscriminatory Access to Buildings for Telecommunications", adopted July 29, 1998. In that resolution, the NARUC Committee noted that some states, including Connecticut, Ohio and Texas, already require building owners and incumbent telephone companies to give tenants access to the telecommunications carrier of their choice. Nebraska is no different, and this Commission believes residents of Nebraska MDUs should have the same choice.

The intent behind the Telecommunications Act of 1996 was to open up the telecommunications market for competition. However, residents of MDUs have generally been unable to reap the benefits of this industry transformation.

It is true that competition has brought many desirable changes to the telecommunications industry. However, the benefits of competition have not come without a certain amount of additional costs. MDU residents must be given the opportunity to take advantage of competition if they are to be expected to bear any increased costs associated therewith. As such, the Commission believes that residential MDU properties must be opened up to competition.

In order to develop a statewide framework for access to residential MDUs, the Commission finds the following:

Upon the request of a CLEC or any multi-tenant residential property owner (Owner), an ILEC shall provide a MPOE at the MDU property line or at a location mutually agreeable to all parties. The ILEC, or a mutually agreeable third party or CLEC, as identified in a pre-approved list of third-party contractors and CLECs, must complete the move of the MPOE in the most expeditious and cost effective manner possible. Nothing contained herein shall

limit or prohibit access to MDU properties by any competitive carrier through any other technically feasible point of entry.

The CLEC or requesting Owner shall pay the full cost associated with said move. CLECs who connect to the MPOE within three years of the move's completion shall contribute on an equitable and nondiscriminatory pro-rata basis to the initial cost of said move based upon the number of CLECs desiring access to the MDU through such MPOE.

The demarcation point[1] shall remain in its current position unless otherwise agreed to by the parties. If the demarcation point remains unmoved, then the ILEC shall retain ownership of any portion of the loop between the demarcation point and the newly moved MPOE as well as any existing campus wire (jointly referred to hereafter as "campus wire"). Said CLECs shall be authorized to use the ILEC's campus wire for a one-time fee of 25 percent of "current" construction charges of the portion of the loop between the demarcation point and the newly moved MPOE based upon an average cost per foot calculation. The average cost per foot shall be derived from a sample of recently completed ILEC construction work orders for MDUs, with the resulting calculation subject to periodic Commission review. CLECs which connect to the MPOE within three years of the move's completion shall contribute on an equitable and nondiscriminatory pro-rata basis to the one-time aggregate 25 percent charge for use of the ILEC's campus wire. The portion due from each carrier shall be based upon the number of CLECs desiring access to the MDU through such MPOE.

Maintenance of the campus wire and the MPOE itself shall be performed by the ILEC, or a mutually agreeable third party or CLEC, as identified in the pre-approved list of third-party contractors and CLECs. Such maintenance shall be completed in accordance with national standards and in the most expeditious and cost effective manner possible. Maintenance expenses shall be paid by all current users of such MPOE on a pro-rata basis based upon the percentage of current customers within the affected MDU building or property on the start date of maintenance.

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[1] The demarcation point is the point at which the telephone company's facilities and responsibilities end and customer-controlled wiring begins.

Exclusionary contracts and marketing agreements between telecommunications companies and landlords are anti-competitive and are against public policy. Exclusionary contracts are barriers to entry and marketing agreements can have a discriminatory effect. Therefore, the Commission believes, with the following exception, that all such contracts and agreements should be prohibited.

The Commission is of the opinion that since condominiums, cooperatives and homeowners' associations are operated through a process where each owner has a vote in the entity's business dealings, the prohibitions against exclusionary contracts and marketing agreements should not apply to this type of entity.

## O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that this order hereby establishes a statewide policy for residential multiple dwelling unit access in the state of Nebraska.

IT IS FURTHER ORDERED that all telecommunications providers shall comply with all applicable foregoing Findings and Conclusions as set forth above.

IT IS FURTHER ORDERED that since condominiums, cooperatives and homeowners' associations are operated through a process where each owner has a vote in the entity's business dealings, the prohibitions against exclusionary contracts and marketing agreements shall not apply to this type of entity.

IT IS FINALLY ORDERED that should any court of competent jurisdiction determine any part of this order to be legally invalid, the remaining portions of this order shall remain in effect to the full extent possible.

MADE AND ENTERED at Lincoln, Nebraska, this 2nd day of March, 1999.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

//s//Lowell C. Johnson
//s//Frank E. Landis

Chairman

COMMISSIONERS DISSENTING:
//s//Daniel G. Urwiller

ATTEST:

Executive Director